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Orin G. Briggs

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NEPA AS A MEANS TO PRESERVE AND IMPROVE THE ENVIRONMENT—THE SUBSTANTIVE REVIEW†

ORIN G. BRIGGS*

I. INTRODUCTION

This article is based on the hypothesis that Congress enacted the National Environmental Policy Act of 1969 (NEPA),[1] as it has said, to "encourage productive and enjoyable harmony between man and his environment,"[2] and not to mandate an exercise in the niceties of preparing perfect environmental impact statements. In the process of an overall advocation of the position that NEPA is exclusively and significantly a means to attain the end of environmentally sound federal decisions, this article will first illustrate how the new Guidelines for the Preparation of Environmental Impact Statements (the Guidelines)[3] promulgated by the Council on Environmental Quality (CEQ) affect the impact statement process in a regulatory agency, and will then discuss the latest developments in the legal saga of the substantive review under NEPA.

The National Environmental Policy Act of 1969 sets forth its purpose as being

> [t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[4]

This policy is implemented through section 102(2)(C), which requires

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* Regional Counsel, Environmental Protection Agency, Region IV; B.S., Bob Jones University, 1964; J.D., University of South Carolina, 1967; LL.M., George Washington University, 1971. Although this article was written by Mr. Briggs while serving as Regional Counsel, no official support or endorsement by the Environmental Protection Agency is intended or should be inferred.

[1] 42 U.S.C. §§ 4321 et seq. (1970).

[2] 42 U.S.C. § 4321 (1970).

[3] CEQ Guidelines for the Preparation of Environmental Impact Statements, 38 Fed. Reg. 20,550 (1973) [hereinafter cited as Guidelines].

[4] 42 U.S.C. § 4321 (1970).

an environmental impact statement to be written for every major federal action significantly affecting the environment. The section provides that all agencies of the federal government shall

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[5]

The Council on Environmental Quality, which oversees the implementation of NEPA,[6] has recently promulgated new Guidelines for Preparation of Environmental Impact Statements, both to aid federal agencies in complying with NEPA and to assist the public with its important participatory role under the Act.[7]

II. Preparation of the Environmental Impact Statement (EIS)

A. *What Kind of Action Requires a Statement*

Stated in simple, unbureaucratic terms, the impact statement process consists of three basic steps:

(1) Draft environmental impact statements are circulated to other Federal, State, and local agencies and are made available to the public in accordance with the provisions of these guidelines;
(2) Comments of the agencies and the public are considered; and
(3) Final environmental impact statements, responsive to the comments received, are issued.[8]

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[5] 42 U.S.C. § 4332 (1970).

[6] The Council on Environmental Quality was authorized by the National Environmental Policy Act, 42 U.S.C. § 4342 (1970), and was created by Exec. Order No. 11,514, 3 C.F.R. § 902 (1970), 42 U.S.C. § 4321 (1970).

[7] Guidelines, supra note 3.

[8] Id. § 1500.2, at 20,550.

Section 102(2)(C) of NEPA requires that all federal agencies must prepare impact statements for all "major Federal actions significantly affecting the quality of the human environment."[9] In the new CEQ Guidelines an attempt has been made to provide some guidance to the federal agencies in defining "major Federal actions" and in defining "significantly affecting" in light of the case law on the meaning and scope of this phrase.[10] The types of actions covered by the Act include:

> (1) Recommendations or favorable reports relating to legislation including requests for appropriations. . . .
> (2) New and continuing projects and program activities: directly [or indirectly providing financial assistance] . . . .
> (3) The making, modification, or establishment of regulations, rules, procedures, and policy.[11]

B. *Capsule of Content Requirements for EIS*

Section 1500.8 of the Guidelines in part requires that the following points must be thoroughly addressed in the EIS:

> (1.) A description of the proposed action, a statement of its purposes, and a description of the environment affected, including information, summary technical data, and maps and diagrams where relevant, adequate to permit an assessment of potential environmental impact by commenting agencies and the public . . . .

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[9] 42 U.S.C. § 4332 (1970).

[10] Guidelines, supra note 3, at 20,551-52. The Guidelines summarize this point as follows:

> The words "major" and "significantly" are intended to imply thresholds of importance and impact that must be met before a statement is required. The action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute "Federal action" in contrast to cases where such Federal control and responsibility are not present as, for example, when Federal funds are distributed in the form of general revenue sharing to be used by State and local governments (see § 1500.5(ii)). Finally, the action must be one that significantly affects the quality of the human environment either by directly affecting human beings or by indirectly affecting human beings through adverse effects on the environment.

Id.

[11] Id. § 1500.5. For a thorough discussion of what type of action necessitates an impact statement, see Seeley, The National Environmental Policy Act: A Guideline for Compliance, 26 Vand. L. Rev. 295 (1973); F. Anderson, NEPA in the Courts 56-105 (1973). See also Kross, Preparation of an Environmental Impact Statement, 44 U. Colo. L. Rev. 81, 84-86, 87-88 (1972).

(2.) The relationship of the proposed action to land use plans, policies, and controls for the affected area. . . .
(3.) The probable impact of the proposed action on the environment . . . [including an assessment of] the positive and negative effects of the proposed action . . . [and] indirect, as well as . . . direct, consequences for the environment . . . .
(4.) Alternatives to the proposed action, including, where relevant, those not within the existing authority of the responsible agency. . . .
(5.) Any probable adverse environmental effects which cannot be avoided . . . .
(6.) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity . . . [including] a brief discussion of the extent to which the proposed action involves tradeoffs between short-term environmental gains at the expense of long-term losses, or vice versa . . . .
(7.) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. . . .
(8.) An indication of what other interests and considerations of Federal policy are thought to offset the adverse environmental effects of the proposed action . . . .[12]

C. *Recent Changes in the EIS Procedure*

Most of the judicial gloss applied to NEPA during the past three years has interpreted section 102(2)(C) as requiring full disclosure of the environmental consequences of the proposed federal action. Many cases, in addition to recognizing NEPA's requirement that federal agencies prepare impact statements which meet the full disclosure standard, have implied into the Act a requirement that the agency decisions must reflect a serious consideration of the environmental consequences of the proposed action as those consequences have been identified and discussed in the relevant impact statement.[13] The current CEQ Guidelines incorporate most of this

[12] Guidelines, supra note 3, at 20,553-54.

[13] See Sierra Club v. Froehlke (Kickapoo River Project), 5 E.R.C. 1920 (7th Cir. 1973); Conservation Council v. Froehlke, 473 F.2d 664, 4 E.R.C. 2039 (4th Cir. 1973); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 786-87, 3 E.R.C. 1126, 1128 (D.C. Cir. 1971); Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1114-15, 2 E.R.C. 1779 (D.C. Cir. 1971). See generally Cohen & Warren, Judicial Recogni-

judicial gloss, as can be seen in the following review of the changes in the Guidelines.

One interesting change in the current CEQ Guidelines is an omission. The interim Guidelines of April 1971 specifically exempted the regulatory activities of the Environmental Protection Agency (EPA) from the requirements of the NEPA impact statement process: "Because of the Act's legislative history, environmentally protective regulatory activities concurred in or taken by the Environmental Protection Agency are not deemed actions which require the preparation of environmental statements under section 102(2)(C) of the Act."[14]

The new Guidelines, section 1500.1(a) and section 1500.4, refer to the activities of all agencies of the federal government and thereby imply that the EPA's original exemption no longer exists. In part, the omission of an exemption for the EPA's regulatory activities is due to ambiguity as to whether Congress intended the EPA to be subject to NEPA. The EPA was not in existence at the time NEPA was passed by Congress and it is unclear from the legislative history whether Congress intended it to be subject to NEPA.[15] A similar ambiguity is seen, for example, in the area of water pollution control. The Federal Water Pollution Control Act provides in part:

> Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 . . . .[16]

There are some aspects of water pollution control, then, that are specifically included and some that are specifically excluded from NEPA. By way of analogy this disparity could support either of the

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tion of the Substantive Requirements of the National Environmental Policy Act of 1969, 13 B.C. Ind. & Com. L. Rev. 685 (1972); Landau, A Postscript to *Calvert Cliffs'*, 13 B.C. Ind. & Com. L. Rev. 705 (1972).

[14] Statements on Proposed Federal Actions Affecting the Environment § 5(d), 36 Fed. Reg. 7725 (1971).

[15] For a full discussion of this point, see F. Anderson, supra note 11, at 116-22. The omission was intentional, apparently for the purpose of encouraging the EPA to include regulatory functions within the definition of "major federal actions."

[16] 33 U.S.C. § 1371(c)(1) (Supp. II 1972).

conflicting conclusions that the EPA must be given a specific mandate to include a specific program into the definition of "major Federal action" or that without a specific exclusion, all EPA programs are included.

The courts do not seem to share the CEQ's hesitancy to exempt the EPA's regulatory programs from the impact statement process. In a recent decision, *Portland Cement Ass'n v. Ruckelshaus,*[17] the District of Columbia Circuit, unwilling to exempt all EPA protective activity from the requirements of NEPA, found a "functional equivalent of a NEPA impact statement"[18] in the requirements of section 111 of the Clean Air Act of 1970.[19]

In addition, the Tenth Circuit reversed a district court decision which would have required the EPA to prepare an EIS before promulgating sulphur emission standards. In *Anaconda Co. v. Ruckelshaus,*[20] while interpreting the Clean Air Act, the appellate court decided that the district court lacked jurisdiction because of the nature of the administrative decision-making process. However, the court, in stating that the contention that the EPA must file an impact statement was without merit, said: "To compel the filing of impact statements could only serve to frustrate the accomplishment of the Act's objectives."[21]

The definitive word on whether the EPA's regulatory activities under the Federal Water Pollution Control Act are exempt from the impact statement process may have come recently from Congress. During the Senate debate on the appropriation of $5,000,000 "for the preparation of environmental impact statements as required by section 102(2)(C) [of NEPA] on all proposed actions by the Environmental Protection Agency, except where prohibited by law,"[22] several Senators discussed the "settled relationship" of NEPA and regulatory activities of the EPA.[23] The special funds are intended to be expended only where the agency is required by law to prepare

[17] 5 E.R.C. 1593 (D.C. Cir. 1973).

[18] Id. at 1598. See also International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 3 E.L.R. 20,133 (D.C. Cir. 1973), in which the court rejected an auto company's argument that a decision on emission controls required an impact statement. The decision was already "infused with environmental considerations so pertinent to Congress in designing the statutory framework." Id. at 650 n.130, 3 E.L.R. at 20,149. Accord, Appalachian Power Co. v. EPA, 477 F.2d 495, 5 E.R.C. 1222 (4th Cir. 1973).

[19] 42 U.S.C. § 1857c-6(b)(1)(B) (1970), which provides in part that "[t]he Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate."

[20] 482 F.2d 1301, 5 E.R.C. 1673 (10th Cir. 1973), rev'g 352 F. Supp. 697 (D. Colo. 1972).

[21] 482 F.2d at 1306, 5 E.R.C. at 1675.

[22] 119 Cong. Rec. 18,976 (daily ed. Oct. 10, 1973).

[23] See, e.g., id. (remarks of Sen. Muskie).

impact statements. Senator Muskie summed up the EPA's responsibility:

> Under existing statutory and case law, the only instances wherein the EPA is required to prepare environmental impact statements are in connection with the making of waste treatment construction grants and the issuance of discharge permits for new water pollution sources under the Federal Water Pollution Control Act. Section 511(c)(1) and the legislative history of that act clearly state that all of the provisions of NEPA are to apply to those two specific activities. Except for that narrow extension of NEPA's coverage authorized under section 511(c)(1), the Congress has never wavered from the intention expressed in enacting NEPA that the legislative mandates of the environmental improvement agencies—now EPA—were not to be changed in any way by NEPA.[24]

Another significant point in the new Guidelines is the emphasis on public participation found in the policy statement, section 1500.2(a)(2),[25] and the section on preparing the draft impact statements and public hearings, section 1500.7.[26] In addition, there emerges an increased emphasis on building sound environmental considerations into the decision-making process. The CEQ Guidelines call for "beginning at the earliest possible point, an appropriate and careful consideration of the environmental aspects of proposed action in order that adverse environmental effects may be avoided or minimized and environmental quality previously lost may be restored."[27] This is, of course, a recognition by the CEQ of the importance of involving the public in fundamental decisions which will affect the quality of life, of the significance of the legislative intent in enacting NEPA, and of the Act's judicial gloss. But, more importantly, there is a recognition that agency decisions must take into account environmental aspects "at the earliest possible point." The Congress intended "actions" to mean not only actual construction, but also "project proposals, proposals for new legislation, regulations, policy statements or expansion or revision of ongoing programs."[28]

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[24] Id. at 18,976-77 (remarks of Sen. Muskie). For further discussion as well as opposing views, see 119 Cong. Rec. 8305-08 (daily ed. Sept. 25, 1973); Halfway There: EPA's "Environmental Explanations" and the Duty to File Impact Statements, 3 E.L.R. 10,139-42 (1973); EPA's Responsibilities Under the National Environmental Policy Act: Further Developments, 3 E.L.R. 10,157 (1973).

[25] Guidelines, supra note 3, at 20,550.

[26] Id. at 20,553-54.

[27] Id. § 1500.1(a), at 20,550.

[28] NEPA, Legislative History, S. Rep. No. 296, 91st Cong., 1st Sess. 86 (1969). For a

The timing of the impact statement must be "late enough in the development process to contain meaningful information, but . . . early enough so that whatever information is contained can practically serve as input into the decision making process."[29] An example of a mandatory EIS at the early stage of the development is presented in *Scientists' Institute for Public Information v. Atomic Energy Commission.*[30] The District of Columbia Circuit in *Scientists' Institute* required that the Commission prepare an impact statement for one of its special research and development programs. The court reasoned that NEPA applied to both individual construction projects and large-scale development plans. Because the total program would require vast expenditures of money and would influence the course of electric power generation for years to come, the court felt it was essential to consider the environmental factors early in the process.[31] The CEQ Guidelines recognize such a commitment of funds to "projects and program activities"[32] and require an early EIS when the federal action is a major one which will significantly affect the environment.[33]

An interesting side issue in section 1500.5 of the Guidelines portends further court interpretation. This section specifically includes, as action requiring an EIS, projects and program activities supported in whole or in part through "Federal contracts, grants, subsidies, loans or other forms of funding assistance (*except where such assistance is solely in the form of general revenue sharing funds* . . .)."[34] This approach is particularly interesting in view of the decision in *Ely v. Velde.*[35] In *Ely* the Fourth Circuit held that the Law Enforcement Assistance Administration must comply with NEPA in allocating to the State of Virginia federal funds under the Omnibus Crime Control and Safe Streets Act even though this act prohibits federal interference with a state's use of such funds.[36] On the other hand, the Ninth Circuit rejected the argument that NEPA applied to the farm subsidy program, noting:

> Payment of the subsidies is mandatory under the Agricultural Act of 1970. The recipient is free to use the

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discussion of the intended scope of NEPA as well as the timing of NEPA statements, see Note, 13 B.C. Ind. & Com. L. Rev. 802 (1972).

[29] Scientists' Institute for Pub. Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1094, 5 E.R.C. 1418, 1427 (D.C. Cir. 1973).

[30] 481 F.2d 1079, 5 E.R.C. 1418 (D.C. Cir. 1973).

[31] Id. at 1096-98, 5 E.R.C. at 1426.

[32] Guidelines, supra note 3, § 1500.5(a)(2), at 20,551.

[33] Id. § 1500.2, at 20,550.

[34] Id. § 1500.5(a)(2), at 20,551 (emphasis added).

[35] 451 F.2d 1130, 3 E.R.C. 1280 (4th Cir. 1971).

[36] Id. at 1137, 1139, 3 E.R.C. at 1285, 1286.

> money in any way he sees fit. The fact that it (or other money of the recipient) was put to a use affecting the environment cannot convert that private use into federal action.[37]

The implication of such decisions as these may be that, despite the CEQ's decision to exempt general revenue-sharing projects from the EIS procedure, such exemption is far from accepted as settled; the courts may resolve this issue by deciding at which level of government ultimate control over the uses of the money will vest.

The CEQ Guidelines now also prevent a piecemeal avoidance of NEPA by fragmenting programs into individual projects.[38] The new Guidelines emphasize the importance of considering the cumulative impact of proposed actions on the environment. Thus, an impact statement should be prepared if the cumulative impact of several projects is significant, even though each individual project would not warrant an impact statement.[39]

Included in the CEQ Guidelines definition of "significant effects" are the "secondary effects," which are often overlooked in the impact statement process; these vary with the nature of the project, but must take into account growth characteristics of an area and population patterns.[40] This factor is particularly important in the consideration of any "adverse environmental effects which cannot be avoided (such as water or air pollution, undesirable land use patterns, damage to life systems, urban congestion, threats to health or other consequences adverse to the environmental goals set out in section 101(b) of the Act [NEPA].)"[41] Such language often evokes images of rural environments—*e.g.*, fields, streams, forests—but the Second Circuit in *Hanly v. Mitchell*[42] issued a reminder that urban environments also merit protection. In considering the impact of a proposed new courthouse and jail in a mixed business-residential section of Manhattan, the court noted:

> The National Environmental Policy Act contains no exhaustive list of so-called "environmental considerations," but without question its aims extend beyond sewage and

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[37] King's County Ass'n v. Hardin, 5 E.R.C. 1383, 1384 (9th Cir. 1973).

[38] Sierra Club v. Froehlke (Trinity Project), 359 F. Supp. 1289, 5 E.R.C. 1033 (S.D. Tex. 1973).

[39] Guidelines, supra note 3, §§ 1500.6(a), .8, at 20,551-52, 20,553-54.

[40] Id. § 1500.8(a)(3), at 20,553.

[41] Id. § 1500.8(a)(5), at 20,554.

[42] 460 F.2d 640, 647, 4 E.R.C. 1152, 1157 (2d Cir. 1972). In support of its proposition the court cites Ely v. Velde, 451 F.2d 1130, 3 E.R.C. 1280 (4th Cir. 1971), which concerned the construction of a correctional facility in a historic section of Virginia, and Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 3 E.R.C. 1087 (D. Ore. 1971), which concerned the impact on a neighborhood of a high-rise apartment building.

> garbage and even beyond water and air pollution. . . . The Act [section 101(a)] must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban "environment" and are surely results of the "profound influences of . . . high-density urbanization [and] industrial expansion."[43]

The CEQ Guidelines, in response to judicial mandate, emphasize the importance of detailed consideration of alternatives to a proposed action.[44] In particular, there is an increased emphasis on the alternatives of either taking no action or postponing action. In addition to the section of the Guidelines which requires an agency to consider "[a]lternatives . . . including, where relevant, those not within the existing authority of the responsible agency,"[45] there is an accent on the interdisciplinary approach required by section 102(2)(a) of NEPA. Section 1500.8(c) of the Guidelines requires agencies to "[a]ttempt to have relevant disciplines represented on their own staffs; where this is not feasible they should make appropriate use of relevant Federal, State, and local agencies or the professional services of universities and outside consultants."[46] The Guidelines also emphasize that this approach should be used at the early planning stages of the proposed action, as discussed earlier in this article.[47] The interdisciplinary approach to EIS planning and preparation is required for the purpose of insuring the "integrated use of the natural and social sciences" so as to assure a "systematic evaluation of reasonable alternative courses of action and their potential, economic, and environmental consequences."[48]

The question of the need for the consideration of alternatives outside the authority of the implementing agency was discussed in *National Resources Defense Council, Inc. v. Morton.*[49] The Secre-

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[43] 460 F.2d at 647, 4 E.R.C. at 1157, quoting 42 U.S.C. § 4331(a) (1970). But see Maryland Planning Comm'n v. Postal Serv., 5 E.R.C. 1719 (D.C. Cir. 1973). There the court stated that the type of land-use environmental effects which zoning regulation addresses "cannot fairly be projected as having been within the contemplation of Congress" when it passed NEPA. 5 E.R.C. at 1724.

[44] In the Policy Section, § 1500.2, the Guidelines emphasize: "In particular, agencies should use the environmental impact statement process to explore alternative actions that will avoid or minimize adverse impacts . . . ;" and § 1500.8(a)(4) requires consideration of "[a]lternatives to the proposed action, including, where relevant, those not within the existing authority of the responsible agency." Guidelines, supra note 3, at 20,550, 20,554.

[45] Id. § 1500.8(a)(4), at 20,554.

[46] Id.

[47] See text at note 27 supra.

[48] Guidelines, supra note 3, at 20,554.

[49] 337 F. Supp. 170, 3 E.R.C. 1623 (D.C. Cir. 1972).

tary of the Interior made plans to issue oil and gas leases on the continental shelf of Louisiana. An impact statement which had been prepared was found inadequate on grounds of its having failed to include all reasonable alternatives to the proposal.[50] Notwithstanding the fact that some of the alternatives, including the need for foreign policy decisions and legislative determinations, were beyond the Department's control, the court said that some discussion of these options was essential in order to inform the decision-makers in the executive and legislative branches of their existence.[51] Two major NEPA issues which have been resolved by the courts are what kinds of federal actions require the preparation of an impact statement and what are the basic elements which go into an adequate impact statement. Major changes in the CEQ Guidelines have resulted in placing more emphasis on public participation in the preparation of impact statements, early recognition of the need for impact statements, consideration of secondary effects of proposed actions, detailed consideration of all feasible alternatives, and a broader interdisciplinary approach to evaluation of proposed actions.[52]

III. Substantive Review Under NEPA

The issue of substantive review under NEPA has been raised succinctly in a recent treatise:

> The courts stand on the threshold of an important new chapter in NEPA's judicial interpretation. Perhaps they will be content with a general review of compliance with § 101; its broad language may discourage extensive detailed interpretation. On the other hand, Calvert Cliffs' vague requirement that agencies "consider" and balance environmental factors may not prescribe a decision-making process that can obtain the rather explicit results desired by Congress when it enacted NEPA. If the courts cannot

[50] Id. at 171, 3 E.R.C. at 1623.

[51] Accord, Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 4 E.R.C. 1721 (8th Cir. 1972). But see Landau, supra note 11, at 716-17, for the conclusion that executive privilege may be exercised when matters of national defense are involved. In addition, Roger Crompton and Richard Berg discuss the function of substantive elements and judicial review in an interesting article, Crompton & Berg, On Leading a Horse to Water: NEPA & The Federal Bureaucracy, 71 U. Mich. L. Rev. 511 (1973). They make the point that NEPA has had the intended effect of making decision-making more responsive to environmental considerations and has tended to offset the one-concept agency decision. Id. at 514-17.

[52] For an exhaustive review of the various procedural questions under NEPA, see Sierra Club v. Froehlke (Trinity Project), 359 F. Supp. 1289, 5 E.R.C. 1033 (S.D. Tex. 1973), and the recently published treatise, F. Anderson, NEPA in the Courts (1973).

> effectively review agency compliance with NEPA's basic purposes, *they may become impatient* with repeated reviews of procedural compliance and cursory substantive reviews, and *begin to interpret § 101 and § 102(1) in ways which more precisely define the allowable scope of agency discretion.*[53]

This article now turns to a consideration of a possible new judicial posture on the scope of review of agency decision-making under NEPA, and it should be noted that the task of establishing clearly defined parameters of the substantive review may take as long as it has taken to bring some clarity to the scope of the procedural review. However, advocacy of a substantive review is not tantamount to a statement that NEPA confers upon the courts the power to prohibit proposed projects simply because there has been a minimal failure to comply with either procedural or substantive provisions of the Act.[54]

The courts have been struggling with the distinction between the procedural and substantive requirements of NEPA since its inception. At the root of the difficulty is the question of the extent to which federal agencies must incorporate environmental factors into their decision-making processes and the question of implementation of section 101. The courts' reactions to the interrelationships of sections 101 and 102 are diverse.[55] At this point it is valuable to examine some of the kinds of decisions that courts have been making when considering the substantive requirements of NEPA and to attempt to extract the most consistent interpretation of the standard for the NEPA substantive review.

A leading case on the question of NEPA's substantive require-

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[53] F. Anderson, supra note 52, at 265 (emphasis added).

[54] This unacceptable elevation of the means over the end was, however, advocated in a recent scholarly article. The authors of this article, Cohen and Warren, advocate rather vehemently the position that NEPA creates major substantive environmental rights which can only be protected by a case-by-case, exhaustive review pursuant to a standard which creates a presumption against an agency decision which is called into question by environmentalists. Briefly stated, the Cohen-Warren substantive review standard is:

> Regardless of the final resolution of this question of individual environmental rights, NEPA does create, at the very least, *a right to require compliance by the federal government with all of the Act's operative provisions.* This right is one "which citizen groups, functioning as private attorneys general, have standing to protect in the public interest."

Cohen & Warren, Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969, 13 B.C. Ind. & Com. L. Rev. 685, 688 (1972) (emphasis added) (footnote omitted).

[55] An extensive discussion of the case law on these two sections appears in F. Anderson, supra note 52, at 246 et seq.

ments is *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission.*[56] There the court rejected the idea that mechanical compliance with procedure on the part of agencies would suffice. "[T]he requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts."[57] The court went on to say that the decision of any agency must include good faith consideration of the environment, and stated further that "reviewing courts probably cannot reverse a substantive decision on its merits . . . *unless* it be shown that the actual balance of costs and benefits that was struck was *arbitrary* or clearly gave insufficient weight to environmental issues."[58]

In a recent Wisconsin case, *Farwell v. Brinegar,*[59] the district court was requested to review the environmental impact statement for the construction of a highway from Dodgeville to Mt. Horeb, Wisconsin. The judge rejected the EIS on grounds of procedural inadequacy. Relying heavily on the reasoning of *Calvert Cliffs',* he noted that he had only "minimal substantive review within [his] authority."[60] He insisted that "this court cannot reverse a substantive decision on the merits unless plaintiffs demonstrate that the actual balance of costs and benefits that was struck by the agency was clearly arbitrary and capricious, providing insufficient weight to environmental values."[61]

A limited substantive review was made in *Scenic Hudson Preservation Conference v. FPC,*[62] in which the court accepted an FPC decision to allow a pumped-storage reservoir to be constructed in the scenic area of Storm King Mountain. The Second Circuit said:

> Where the Commission has considered all relevant factors, and where the challenged findings, based on such full consideration, are supported by substantial evidence, we will not allow our personal views as to the desirability

[56] 449 F.2d 1109, 2 E.R.C. 1779 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).

[57] 449 F.2d at 1114, 2 E.R.C. at 1782. See also Cape Henry Bird Club v. Laird, 359 F. Supp. 404, 5 E.R.C. 1283 (W.D. Va. 1973), where the court applied the "arbitrary and capricious" standard while approving of an action by the Corps of Engineers as not being "a clear error of judgment." The court defined its rule as being "not only to see that government agencies have complied with all the procedural requirements, but also to engage in 'substantial inquiry' to determine 'whether there has been a clear error of judgment.' " Id. at 410, 5 E.R.C. at 1286. Courts are allowed to delve into the decision-making process on their own to determine if the agency's decision was arbitrary and capricious.

[58] 449 F.2d at 1115, 2 E.R.C. at 1783 (emphasis added).

[59] 5 E.R.C. 1939 (W.D. Wis. 1973).

[60] Id. at 1948.

[61] Id.

[62] 453 F.2d 463, 3 E.R.C. 1232 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972).

> of the result reached by the Commission to influence us in our decision.[63]

There have been a few cases in which a court has been willing to state or imply that if a decision were unsound it could be judicially changed even though all relevant factors were considered by the deciding agency.[64] On the other hand, an inference can be drawn from a number of cases[65] that some courts have given the procedural requirements of NEPA a very strict interpretation for the purposes of finding government agencies' decisions to be "arbitrary and capricious," when in all likelihood the fact has been that such courts have simply disagreed with the EIS decision. In *Sierra Club v. Froehlke* (Trinity Project),[66] a federal district court found that an EIS contained numerous deficiencies. After considering the evidence presented as to the true character and purposes of the Wallisville portion of the Trinity Project, which constituted the subject of the relevant EIS, the court said:

> [T]he existing Wallisville environmental impact statement is insufficient under NEPA, since it lacks the requisite detail and fails to satisfy the full disclosure requirements of the Act. Alternatives to the present project are inadequately considered, and there is no indication that genuine efforts have been made to mitigate any of the major impacts on the environment resulting from the construction of the project.[67]

In *National Resources Defense Council, Inc. v. Grant,*[68] a case concerning the Chicod Creek channelization project, the court found the impact statement inadequate in that it did not make "full and accurate disclosure of the environmental effects of the proposed action and alternatives to such action . . . ."[69] While saying that it would not substitute its judgment for that of the legislature or agency, the court reasoned: "The Court's function is to determine whether the environmental effects of the proposed action and reasonable alternatives are sufficiently disclosed, discussed, and that conclusions are substantiated by supportive opinion and data."[70]

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[63] 453 F.2d at 468, 3 E.R.C. at 1235-36.

[64] See, e.g., Conservation Council v. Froehlke, 473 F.2d 664, 4 E.R.C. 2039 (4th Cir. 1973); Save Our Ten Acres v. Kreger, 4 E.R.C. 1941 (5th Cir. 1973).

[65] See text at notes 66-70 infra.

[66] 359 F. Supp. 1289, 5 E.R.C. 1033 (S.D. Tex. 1973).

[67] Id. at 1384, 5 E.R.C. at 1097.

[68] 355 F. Supp. 280, 5 E.R.C. 1001 (E.D.N.C. 1973).

[69] Id. at 286, 5 E.R.C. at 1004.

[70] Id.

The NEPA substantive review received strong support from the Eighth Circuit in *Environmental Defense Fund, Inc. v. Corps of Engineers.*[71] In this case the court reviewed the EIS for the Gillham Dam on the Cassatot River in Arkansas and, while holding that the EIS decision was not arbitrary, concluded that NEPA very clearly imposes on the federal agencies a responsibility to comply with the substantive provisions as much as it requires compliance with section 102(2)(C).[72] The Eighth Circuit said:

> The unequivocal intent of the NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives.
>
> The application of the substantive principles of NEPA is to be made by the agency through "a careful and informed decision-making process." The agency must give environmental factors consideration along with economic and technical factors. "To 'consider' the former 'along with' the latter must involve a balancing process."
>
> Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits.[73]

A recent NEPA case which discusses the substantive review question, *National Helium Corp. v. Morton,*[74] stands adamantly opposed to a substantive review of the impact statement and fails to address the question of reviewability of the EIS decision. The decision of the Tenth Circuit says that section 102(2)(C) is the sole criterion for testing the adequacy of the impact statement.[75] This decision stands in stark contrast to the district court decision it reversed.[76] Although not having to rule specifically on the decision of the Secretary of the Interior to dispense with the helium conservation program, the district court said in reviewing the EIS that the impact statement is "appallingly deficient in a number of respects" and "blatantly misdescribes the actual effect of the proposed action."[77]

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[71] 470 F.2d 289, 4 E.R.C. 1721 (8th Cir. 1972).

[72] Id. at 297-98, 301, 4 E.R.C. at 1726-28.

[73] Id. at 298, 4 E.R.C. at 1726 (citations omitted).

[74] 6 E.R.C. 1001 (10th Cir. 1973).

[75] Id. at 1004-05.

[76] 361 F. Supp. 78, 5 E.R.C. 1545 (D. Kan. 1973).

[77] Id. at 99, 5 E.R.C. at 1558. Also, the district court, in dictum, expressed support for the principle of substantive review:

> Based upon the clear language of NEPA, its implementing provisions, its

It should be noted that the Tenth Circuit in *National Helium* refused to reconsider the EIS decision and limited its review of the district court decision to a consideration of the adequacy of the impact statement and the standard for that review.[78] In discussing the appropriate standard for review of the EIS, the court noted that a distinction should be made between the "arbitrary or capricious" standard for review of agency action and the standard for review of the EIS with regard to procedural compliance with NEPA. The court stated its view:

> The rule of reason is a more appropriate standard where the sufficiency of the statement is being tested.
>
> In summary, then, our view is that the review of the FES [Final Environmental Statement] is limited to the following:
>
> (1) Whether the FES discusses all of the five procedural requirements of NEPA.
>
> (2) Whether the environmental impact statement constitutes an objective good faith compliance with the demands of NEPA.
>
> (3) Whether the statement contains a reasonable discussion of the subject matter involved in the five required areas.[79]

It is submitted that the NEPA questions would be much easier to answer if the district courts, in cases such as *National Helium* and *Corps of Engineers,* would be more willing to review the EIS decision directly, acknowledging such consideration openly as a substantive review rather than resorting to the circuitous alternative of discrediting it by means of a scathing attack on the procedural adequacy of the EIS supporting the decision.

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legislative history, the many cases interpreting its import, and the underlying policy which it was intended to foster, it is clear that the mere formal filing of a document, in and of itself, does not satisfy the Act's substantive and procedural mandates or preclude further inquiry by judicial review. As noted in the recent Tenth Circuit Court of Appeals decision in *Davis v. Morton,* 469 F.2d 593 (1972):

"Reading the Act and its legislative history together, there is little doubt that Congress intended all agencies under their authority to follow the *substantive and procedural mandates* of NEPA. . . . Compliance with NEPA is more than a mere ritual . . . ."

Id. at 96, 5 E.R.C. at 1556 (emphasis in the original) (citation omitted). With this language the district court has confused the substantive review of the *decision* with the procedural review of the EIS, a distinction which is not always recognized by other courts.

[78] 6 E.R.C. at 1005.

[79] Id. (footnote omitted).

IV. Proposed Future Standard

A. *Summary*

The review of the EIS decision on its merits for substantive compliance represents the current cutting-edge of the NEPA sword and has developed only recently. As late as January 1973, it was still unclear whether the courts *would* extend their substantive review beyond the question of whether the impact statement was properly reflected in the decision; it still is not a settled issue whether or not they *ought to*. A former Regional Counsel for the EPA has observed:

> If a statement reveals the probability of substantial environmental degradation from a major action, does NEPA preclude the continuation of the project? Although some have argued that the Act imposes substantive limitations on federal activities that injure the environment, *the courts have concluded that NEPA requires compliance with its procedures, but that it does not restrict substantive project choices.*[80]

Three alternatives for the ultimate test of the EIS and the decision regarding it have emerged: (1) a simple procedural requirement of filing a statement which discusses the environmental issues and alternatives; (2) a substantive requirement that the environmental impact be a decisive factor in an agency decision; and (3) the more recent test that the EIS decision must meet the substantive requirements of NEPA. A summary of the judicial interpretation of the content requirements for impact statements, albeit difficult, is helpful in developing an appreciation of the trend of the courts toward finding in NEPA a requirement for substantive review of the EIS decision.

In the summary section of his treatise *NEPA in the Courts*, Anderson made a commendable effort to state briefly the major considerations in evaluating the EIS content:

> The courts have measured the adequacy of the statement itself by the standard of "full disclosure," which itself is partially qualified by a "rule of reason" governing the length and detail of the agency's investigations. . . .
>
> When actually reviewing the contents of challenged statements, the courts have elaborated the policy of full disclosure into more specific requirements. They have said

[80] Seeley, The National Environmental Policy Act: A Guideline for Compliance, 26 Vand. L. Rev. 295, 297-98 (1973) (emphasis added) (footnotes omitted).

> that statements must be understandable and nonconclusory, that they must refer to the full range of knowledge, and that they must discuss certain impacts which are typical of some types of action. Especially important is the use made in the statement of responsible dissenting scientific opinion . . . . Further, even appropriate references to supporting information may be inadequate where important reasons exist for fuller disclosure of underlying logic (e.g., public need, lack of specificity about alternatives, etc.).[81]

Recent decisions, however, make it clear that full procedural compliance with NEPA is not enough.[82] A reading of the major cases makes it clear that the courts have been careful to look beyond mere compliance with the basic content requirements of the impact statements.[83]

B. *Toward an Admittedly Substantive Review*

Not only have the courts carefully reviewed agency impact statements for procedural compliance with NEPA, but they have also begun to extend that review to determine whether the agencies are complying with the substantive provisions of NEPA. It seems apparent that procedural gamesmanship which is required by decisions like that of the district court in *Environmental Defense Fund, Inc. v. Corps of Engineers*[84] would be unnecessary if the courts were more willing to admit to judging the EIS decision substantively.

The substantive review test which is most reasonable and is most in keeping with the intent of NEPA is the substantive review articulated recently by the Seventh Circuit in *Sierra Club v. Froehlke* (Kickapoo River Project).[85] The court was presented with

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[81] F. Anderson, supra note 52, at 284.

[82] Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 4 E.R.C. 1829 (8th Cir. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 4 E.R.C. 1721 (8th Cir. 1972); Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 2 E.R.C. 1779 (D.C. Cir. 1971).

[83] See H. Yarrington, The National Environmental Policy Act, 4 BNA Env. Rptr. No. 36 (Monograph No. 17, 1974).

> While the trend toward sustantive review of agency decisions to assure compliance with the principles of Section 101 of NEPA appears to be well supported by recent district court decisions, the split on the issue between the various circuits cannot be ignored. The question is not as yet finally resolved. Uncertainty on the question is heightened further by the fact that the U.S. Supreme Court refused to grant certiorari in Environmental Defense Fund v. Corps of Engineers (Gillham Dam). Had the Court taken the case, perhaps the divergence of views in the circuit courts might have been resolved.

Id. at 39.

[84] 325 F. Supp. 749, 2 E.R.C. 1260 (E.D. Ark. 1971).

[85] 5 E.R.C. 1920 (7th Cir. 1973).

the question of whether the environmental impact statement for a flood control dam project in the Kickapoo River, Wisconsin, complied with the mandates of NEPA. The plaintiffs specifically alleged that "the district courts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA."[86] After stating that the court agreed with the plaintiffs that NEPA required a substantive review of the EIS decision, the Seventh Circuit, quoting language from *Environmental Defense Fund, Inc. v. Corps of Engineers,*[87] said: "After reviewing the environmental impact statement prepared by the Corps, we are convinced that the Corps 'reached its decision after a fair, good faith consideration and balancing of environmental factors,' and that its decision is neither arbitrary nor capricious."[88] This test admits to being substantive but limits the review to the issue of whether the EIS decision is arbitrary or capricious in light of the substantive provisions of NEPA.[89]

Many courts have cited Davis' treatise on Administrative Law[90] to justify the substantive review.[91] Professor Davis, in the volume in which he had condensed his lengthier treatise, makes it clear that at common law agency decisions are presumed to be reviewable except in limited circumstances and that the common law was not effectively changed by the Administrative Procedure Act;[92] he summarizes the law on reviewability as follows:

> Administrative action is generally reviewable unless (a) legislative intent is discernable which favors unreviewability or (b) a special reason growing out of the subject matter or the circumstances calls for unreviewability. With rare exceptions, the special reason is a belief that the issues are inappropriate for judicial determination; included in such issues are questions about foreign policy,

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[86] Id. at 1923.

[87] 430 F.2d 289, 4 E.R.C. 1721 (8th Cir. 1972).

[88] 5 E.R.C. at 1924.

[89] After reviewing its own early decision in Scherr v. Volpe, 466 F.2d 1027, 4 E.R.C. 1435 (7th Cir. 1972), and recent decisions of other circuits, the Seventh Circuit in Sierra Club v. Froehlke (Kickapoo River Project) said:

> In light of these statements, we feel compelled to hold that an agency's decision should be subjected to a review on the merits to determine if it is in accord with the substantive requirements of NEPA. The review should be limited to determining whether the agency's decision is arbitrary or capricious.

5 E.R.C. at 1924 (citations omitted).

[90] K. Davis, Administrative Law Treatise (1958).

[91] See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 298, 4 E.R.C. 1721, 1726 (8th Cir. 1972).

[92] 5 U.S.C. § 706 (1970).

military activities, and other specialized subjects which are beyond the range of legal training.[93]

The more important question is what standard of judicial review should be used to test the EIS decision. The *Sierra Club v. Froehlke*[94] test of "arbitrary or capricious" in light of the substantive provisions of NEPA seems to be the most precise and most equitable test and the one which conforms to the principles of agency review discussed by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe.*[95] In *Overton Park,* which was not interpreting NEPA, the Court noted that the Administrative Procedure Act codified three primary standards for judicial review of agency decisions. First, in any case agency action must be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[96] Second, "[i]n certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by 'substantial evidence.' "[97] And third, "in other equally narrow circumstances the reviewing court is to engage in a *de novo* review of the action, and set it aside if it was 'unwarranted by the facts.' "[98] Although some courts have applied the substantial evidence test to NEPA[99] and others have confused a clear error in judgment with the substantial evidence rule,[100] the Supreme Court limited this rule's application: "Review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself . . . or when the agency action is based on a public adjudicatory hearing."[101]

In *Environmental Defense Fund, Inc. v. Corps of Engineers,*[102] the Eighth Circuit specifically advocated both a procedural review of the EIS and a substantive review of the EIS decision, and defined its "arbitrary or capricious" test as a review of the decision, includ-

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[93] K. Davis, Administrative Law 523 (1972).

[94] 5 E.R.C. at 1924.

[95] 401 U.S. 402 (1972).

[96] 5 U.S.C. § 706(2)(A) (1970), quoted in 401 U.S. at 413-14.

[97] 401 U.S. at 414.

[98] Id.

[99] In Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 3 E.R.C. 1232 (2d Cir. 1972), the court applied the substantial evidence rule to the question of full consideration of all relevant environmental factors. Id. at 468, 3 E.R.C. at 1235-36.

[100] In Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 2 E.R.C. 1779 (D.C. Cir. 1971), the court equated "arbitrary" with insufficient weight of evidence, thus confusing the "arbitrary or capricious" standard with the substantial evidence rule 449 F.2d at 1115.

[101] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1972) (citations omitted). See also text at note 94 supra.

[102] 470 F.2d 289, 4 E.R.C. 1721 (8th Cir. 1972).

ing the consideration of all relevant factors, to determine whether "the decision itself represented a clear error in judgment."[103] The Eighth Circuit was applying the arbitrary and capricious standard of the Supreme Court as it was articulated in *Overton Park,* where the Court explained the finding required pursuant to this standard:

> To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[104]

It is respectfully submitted that all of the above standards are more subjective and less definable than the clear substantive review standard articulated in *Sierra Club v. Froehlke.*[105] Any standard less precise than the *Sierra Club v. Froehlke* "arbitrary or capricious" test which is used to judge compliance with the substantive provisions of NEPA may prove not only imperfect, but incomprehensible and thus wholly unviable. Anything less precise tends to elevate the means above the end. The end is a preserved and improved environment, not volumes and volumes of neatly packaged impact statements.

Any decision to adopt the position supported by the largest quantity of judicial decisions must necessarily lead to the conclusion that there are two tests to be applied to the EIS and the EIS decision: first, that of "full and accurate disclosure of information required by § 102(2)(C);"[106] and second, that of "a review [of the EIS decision] on the merits to determine if it is in accord with the substantive requirements of NEPA."[107] This latter test is a determination of "whether the agency's decision is arbitrary or capricious."[108] These tests are advanced in *Environmental Defense Fund, Inc. v. Corps of Engineers* and in *Sierra Club v. Froehlke* and are supported substantially by numerous other cases.[109]

If the courts fail to see NEPA solely as a means of achieving an improved environment, they will continue to elevate the EIS process to a loftier position than that which Congress intended it to have. If

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[103] Id. at 300, 4 E.R.C. at 1728.

[104] 401 U.S. at 416 (citations omitted).

[105] 5 E.R.C. at 1924.

[106] Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d at 295, 4 E.R.C. at 1723.

[107] Sierra Club v. Froehlke (Kickapoo River Project), 5 E.R.C. at 1924.

[108] Id.

[109] See text at notes 58-61 supra.

the courts will face the fact that they are effectively reviewing the EIS decision as well as the statement, the cases will be aimed toward the end of preservation of our irreplaceable environment and not at some mythical standard of a perfectly processed environmental impact statement. It is hoped that this article will encourage the federal agencies and the courts to set as their goals environmentally sound decisions based on the substantive requirements of NEPA.